

STATE OF MICHIGAN
COURT OF APPEALS

CHURCH MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 30, 2003

No. 240571

Ottawa Circuit Court

LC No. 99-035674-NZ

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Jamestown Reformed Church sustained property damage when a power line came loose during a snowstorm, struck the church, and started a fire. Plaintiff Church Mutual Insurance Company paid Jamestown Reformed Church for the damages it sustained from the fire. Plaintiff then filed this subrogation action against defendant Consumers Energy Company for negligence, nuisance, and trespass. Plaintiff subsequently requested partial summary disposition on the trespass claim. Defendant responded to plaintiff's motion and additionally sought summary disposition on the remaining claims. The trial court denied plaintiff's motion and granted defendant summary disposition on each issue. We affirm.

On appeal, we are asked to determine whether the trial court properly granted defendant summary disposition on the issues not included in plaintiff's motion for summary disposition. In making this decision, we must ascertain whether the trial court could properly consider defendant's response to plaintiff's motion under the court rules. Because defendant substantially complied with the time requirements set forth in the court rules and plaintiff failed to make a genuine showing of prejudice, we find no error with the trial court's decision to consider all of the issues raised in defendant's response to plaintiff's motion for summary disposition.

We are further asked to decide if the primary jurisdiction doctrine should apply to plaintiff's negligence claim, thereby deferring jurisdiction of this issue to the Michigan Public Service Commission (MPSC). Given the fact that the primary issues plaintiff raises are specifically governed and anticipated under the tariff, we find that the trial court's reliance on the primary jurisdiction doctrine was appropriate in this case. We also conclude that plaintiff's claims of nuisance and trespass were properly dismissed.

I. Facts and Procedural History

The instant case involves a subrogation action, wherein plaintiff brought suit against defendant to recover the \$2,416,817.77 it paid out to Jamestown Reformed Church for damages, after a power line came loose during a snowstorm and set the church on fire.

On January 2, 1999, west Michigan endured blizzard conditions and high winds. During this storm, a wooden pin that secured a 7200-volt primary power line detached from a wooden cross-arm on a utility pole adjacent to the church. The power line was subsequently blown against the side of the church and started a fire that consumed the building. The high voltage power line was a primary distribution line that supplied power to an area north of the church.

The record reveals that the last inspection of the Jamestown circuit occurred in May 1996. The guidelines for inspections instruct system owners to note and record, among other things, the existence of broken pins. According to James Norton, defendant's system owner responsible for the Jamestown Circuit, there was "no repetitive pattern of failure of wood pins on the Jamestown circuit either before or after the Jamestown fire." The Trouble Analysis System reports for 1997 and 1998 also revealed no history of broken wooden pins.

Dr. Robert Svare, plaintiff's expert, opined that the fire was caused by the 7200-volt power line detaching from the center pole and hitting the church. He asserted that "[t]he center pole's cross arm and west line insulator were not properly maintained." Rather, he claimed that the cross arm and insulator peg were allowed to deteriorate into an unsafe condition. Dr. Svare further alleged that the winds and snow were foreseeable occurrences in Michigan. He noted "[t]he NESC (National Electric Safety Code) required Consumer's Energy to maintain their lines and equipment in such a manner as to not endanger the church."

On December 27, 1999, plaintiff brought suit against defendant, alleging negligence, nuisance, and trespass. Plaintiff subsequently moved for partial summary disposition on the trespass claim, pursuant to MCR 2.116(C)(9) and (10), on December 4, 2001. In response to plaintiff's motion, defendant filed a motion requesting summary disposition in its favor on all issues. Defendant served a copy of this motion to plaintiff on January 15, 2001, and filed the same with the trial court the following day. Defendant argued that summary disposition was appropriate for each claim under MCR 2.116(I)(2).

On January 29, 2002, plaintiff sought to have the February 4, 2002 hearing limited to the issue of trespass. Plaintiff contended that defendant neither provided it with the requisite twenty-one day notice, under MCR 2.116(G)(1)(a)(i), nor sought authorization for a late filing under MCR 2.116(G)(1)(b). Plaintiff argued that defendant could not seek summary disposition in a responsive pleading under MCR 2.116(I)(2) on issues that were never raised in plaintiff's motion.

On February 4, 2002, the trial court heard both parties' motions for summary disposition. Holding that defendant substantially complied with the court rules regarding notice and that plaintiff had adequate time to prepare, the trial court decided to address all of the issues in defendant's brief. The trial court concluded that the negligence claim was a matter within the primary jurisdiction of the MPSC, and granted defendant's motion for summary disposition on the negligence claim. The trial court then granted defendant's motion for summary disposition

on the nuisance claim because the gravamen of plaintiff's complaint was more accurately characterized as a negligence claim. With regard to plaintiff's motion for partial summary disposition on the trespass claim, the trial court concluded that plaintiff could not show that defendant possessed the requisite intent to enter plaintiffs' property. The trial court also denied plaintiff's motion for reconsideration on March 18, 2002.

II. Notice

We initially address plaintiff's claim that the trial court erroneously considered the negligence and nuisance issues raised in defendant's motion for summary disposition because they were not raised in plaintiff's partial motion for summary disposition and defendant failed to meet the twenty-one days' notice period.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal.¹ The interpretation of a court rule likewise presents a question of law subject to review de novo.² But we review a trial court's procedural decisions for an abuse of discretion.³

The record shows that plaintiff filed a motion for partial summary disposition on November 30, 2001. Defendant filed its response to plaintiff's motion with the trial court on January 16, 2002—nineteen days before the February 4, 2002 hearing. Defendant served plaintiff with a copy of its response and motion on January 15, 2002. On appeal, defendant argues that its response was timely because it requested relief under MCR 2.116(I)(2) and was filed more than seven days before the hearing in accordance with MCR 2.116(G)(1)(a)(ii).

MCR 2.116(G) sets forth the time requirements for filing motions for summary disposition. It provides in pertinent part as follows:

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written notice under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

¹ *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

² *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

³ See *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999).

(b) If the court sets a different time for filing and serving a motion or a response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.

We disagree with defendant's claim that its motion was timely because it was responsive to plaintiff's motion and was subject to the seven-day deadline. The only issue defendant could respond to was the trespass claim. Indeed, that portion of defendant's motion was filed in a timely manner.⁴ To the extent defendant's response exceeded the scope of plaintiff's motion, we find that defendant's motion was not responsive and that summary disposition on those issues was unavailable under MCR 2.116(I)(2). This is true because MCR 2.116(I)(2) only applies to situations where the opposing party, not the moving party, is entitled to judgment as a matter of law.⁵

We must next determine what rules apply to defendant's claims. It is well settled that "where a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled."⁶ Defendant's motion for summary disposition on the negligence claim is properly characterized under MCR 2.116(C)(7), because it was based on the primary jurisdiction doctrine.⁷ And it further appears that defendant's motion for summary disposition on the nuisance claim falls under MCR 2.116(C)(8) or (10). While the trial court did not articulate the subrules it used to grant defendant's motion for summary disposition on these claims, "[w]here summary disposition is granted under the wrong rule, Michigan appellate courts . . . will review the order under the correct rule."⁸

Because defendant's motion for summary disposition properly fell under MCR 2.116(C)(7) and (10), it was required to file its counter-motion for summary disposition on these issues at least twenty-one days before the hearing.⁹ Nevertheless, we agree with the trial court that this error was harmless. The trial court noted that "defendant . . . substantially complied with the court rule regarding notice [and] that the plaintiff [had] an adequate opportunity to respond." Indeed, plaintiffs have not asserted nor demonstrated that they were prejudiced by the trial court's decision. We note that this case had been pending for nearly two years when plaintiff filed its motion for partial summary disposition and that defendant's motion was filed only two days past the time limit. This Court has held that in the context of affidavits violating the court rules, "absent a showing of prejudice resulting from noncompliance with the [court]

⁴ MCR 2.116(G)(1)(a)(ii).

⁵ See *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

⁶ *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996).

⁷ *Michigan Basic Property Ins Assn v Detroit Edison Co*, 240 Mich App 524, 529; 618 NW2d 32 (2000).

⁸ *Speik v Dep't of Transportation*, 456 Mich 331, 338, n 9; 572 NW2d 201 (1998).

⁹ See MCR 2.116(G)(1)(a)(i).

rules, any error is harmless.”¹⁰ Affirming the trial court’s decision to consider all the claims in defendant’s motion is consistent with substantial justice.¹¹

B. The Doctrine of Primary Jurisdiction

Plaintiff next asserts that that the trial court improperly deferred this action to the MPSC under the primary jurisdiction doctrine. Specifically, plaintiff argues that as an action in tort, its negligence claim was properly before the circuit court. Whether the primary jurisdiction doctrine applies is a question of law that is reviewed de novo on appeal.¹²

This Court in *Durcon* recently explained the primary jurisdiction doctrine:

This case involves the application of the primary jurisdiction doctrine “whereby a court defers its own jurisdiction to the jurisdiction of an administrative agency better suited to handle the parties’ dispute.” The doctrine “arises when a claim may be cognizable in a court but initial resolution of the issues within the special competence of an administrative agency is required.”^[13]

In essence, “[t]he doctrine reflects the courts’ recognition that administrative agencies, created by the Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field.”¹⁴

The MPSC has the authority to regulate public utilities, including electrical utilities, and oversee their rates and conditions of service.¹⁵ But not every dispute a customer has with a public utility falls under the MPSC’s primary jurisdiction.¹⁶ For instance, case law in Michigan clearly indicates that claims sounding in tort against a public utility or claims that a utility violated the regulatory code or tariffs are properly brought before courts of general jurisdiction.¹⁷

¹⁰ *Baker v DEC Int’l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), rev’d in part on other grounds 458 Mich 247; 580 NW2d 894 (1998).

¹¹ See MCR 2.613.

¹² *Michigan Basic*, *supra* at 528.

¹³ *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002) (citations omitted).

¹⁴ *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198; 631 NW2d 733 (2001), quoting Baron, *Judicial review of administrative agency rules: A question of timing*, 43 Baylor L R 139, 158 (1991).

¹⁵ *Travelers*, *supra* at 195; *Michigan Basic*, *supra* at 530; see also MCL 460.6.

¹⁶ *Michigan Basic*, *supra* at 530.

¹⁷ *Travelers*, *supra* at 202; *Rinaldo’s Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 73, 559 NW2d 647 (1997).

Such holdings, however, do not preclude the MPSC's jurisdiction over claims that have traditionally fallen within its authority.¹⁸ For instance, if a supposed

tort claim alleges the violation of duties that “arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort . . . they are matters incident to the regulation of the [utility] within the primary jurisdiction of the MPSC.”^[19]

Put another way, “[c]ustomer claims anticipated by the tariffs and regulations . . . are governed by those tariffs, and relief from the presumptively valid limitations on liability therein must first be sought before the MPSC.”²⁰

Quoting our Supreme Court in *Rinaldo's Construction*, this Court articulated the following factors to consider when determining whether to suspend court action for agency review:

First, a court should consider “the extent to which the agency’s specialized expertise makes it a preferable forum for resolving the issue” Second, it should consider “the need for uniform resolution of the issue” Third, it should consider “the potential that judicial resolution of the issue will have an adverse impact on the agency’s performance of its regulatory responsibilities.”^[21]

The pertinent question to be asked then is whether the reasons for the primary jurisdiction doctrine’s existence are present and if its purposes will be aided by its application in pending litigation.²² As explained in *Michigan Basic*, we must “consider the nature of the plaintiff’s claim (tort/contract; violation of regulatory code or tariffs) in light of the three purposes underlying the primary jurisdiction doctrine.”²³

In the instant case, defendant argues that the applicable tariff is MPSC Rule B10.1, Character of Service, which provides in pertinent part:

The Company shall not be liable for interruptions in the service, phase failure or reversal, or variations in the service characteristics, or for any loss or damage of any kind or character occasioned thereby, due to causes or conditions beyond the Company’s reasonable control, and such causes or conditions shall be deemed to specifically include, but not be limited to, the following: . . . failure,

¹⁸ *Travelers, supra* at 202.

¹⁹ *Michigan Basic, supra* at 533-534, quoting *Rinaldo's, supra* at 78-79.

²⁰ *Rinaldo's, supra* at 73-74.

²¹ *Durcon, supra* at 558, quoting *Rinaldo's, supra* at 71-72.

²² *Michigan Basic, supra* at 530.

²³ *Id.* at 534.

malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood; fire; riot; labor dispute or disturbances

The trial court noted that while plaintiff's negligence action sounded in tort, its essential argument was that defendant failed to adequately maintain and repair the equipment providing electrical service to the church. The court noted that the MPSC's rules restricted defendant's liability if damages were caused by the breakage or failure of equipment despite defendant's implementation of a maintenance program consistent with industry standard. Finding that the MPSC was better equipped to understand industry standards, the trial court deferred jurisdiction to the MPSC.

Considering plaintiff's claim in light of the three major purposes of the primary jurisdiction doctrine, we do not believe that the trial court erred in deferring jurisdiction to the MPSC. Indeed, the MPSC's "specialized expertise makes it a preferable forum for resolving the issue."²⁴ Whether defendant is exempt from liability under rule B10.1 is a question properly reserved for the MPSC. Maintenance and design problems resulting in damages are clearly anticipated under rule B10.1.²⁵

Moreover, the "need for uniformity in deciding matters incident to the regulatory scheme, also favors deferral to the MPSC."²⁶ As noted in *Rinaldo's*, the MPSC has broad authority to regulate the rate structure to which an electric company is subject.²⁷

"In so doing, it balances the need for the [utility] to cover its expenses and absorb a reasonable return against the need to maintain affordable rates for the use of [the utility's] service by the public. Uniform results in applying the tariffs to customer claims are essential to prevent the [utility] from being exposed to unanticipated liabilities that will hinder its ability to offer affordable . . . service."^[28]

The MPSC's ability to regulate defendant depends on its ability to determine the appropriate engineering standards, as higher standards have a direct affect on electricity rates.

Finally, plaintiff's claim presents issues relating to defendant's obligations to customers as governed by the regulatory scheme. Our Supreme Court has noted:

²⁴ *Rinaldo's*, *supra* at 71.

²⁵ See *id.* at 75-76.

²⁶ *Id.* at 76.

²⁷ See *id.*; see also MCL 460.6.

²⁸ *Rinaldo's*, *supra* at 75-76.

Primary jurisdiction over those claims covered by the tariffs allows the MPSC, through its regulatory expertise, to provide uniform and predictable results in the performance of its regulatory responsibilities. Allowing trial courts to resolve claims incident to the regulatory scheme, on the other hand, without the expertise of the MPSC, could lead to inconsistent application of the regulatory code or tariffs and competing standards for deciding when the regulatory scheme is operative.^[29]

The instant case involves precisely the type of situation properly within the primary jurisdiction of the MPSC. Plaintiff's claim arises "purely out of the matters anticipated by the approved tariffs and code, i.e., the regulatory scheme."³⁰ In essence, plaintiff is complaining of inadequate equipment and maintenance over which the MPSC has control.³¹ Accordingly, we find that the doctrine of primary jurisdiction required deferral of the negligence claim to the MPSC.

We recognize that plaintiff has also raised a claim of nuisance. But as noted by the trial court, we find that the gravamen of plaintiff's claim against defendant was improperly installed and maintained equipment.³² Plaintiff alleged that a nuisance existed because defendant's failure in this regard created a defective and dangerous condition that lead to the instant fire. This is by definition a negligence claim and not a claim for nuisance.³³

C. Trespass

We likewise reject plaintiff's claim that the trial court improperly granted defendant summary disposition on the trespass claim pursuant to MCR 2.116(I)(2). Summary disposition is properly granted to the opposing party under MCR 2.116(I)(2) if the trial court determines that the opposing party is entitled to summary disposition as a matter of law.³⁴

Plaintiff essentially opines that defendant knew that the improper configuration and deteriorated condition of its equipment created a substantial certainty that if a line came down, it would hit the church building.³⁵ A trespass is defined as "an unauthorized invasion upon the

²⁹ *Id.* at 76-77.

³⁰ *Id.* at 77.

³¹ *Id.* at 69, n 5.

³² See *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 82-83; 592 NW2d 112 (1999); see also *Schroeder v Canton Twp*, 145 Mich App 439, 441; 377 NW2d 822 (1985).

³³ See *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995) (holding that a private nuisance requires a nontrespassory invasion of another's interest in the private use of land where the actor's invasion causes significant harm and the invasion was intentional or unintentional but otherwise actionable due to negligent or reckless conduct).

³⁴ *Washburn*, *supra* at 672.

³⁵ See *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67, 71; 602 NW2d 215 (1999).

private property of another.’’³⁶ In order for a trespass to occur, however, there must be proof that the actor intended to intrude on the property of another without permission.³⁷ As defendant’s customer, the church was required to provide defendant space on its premises for its facilities, and defendant had a right-of-way for maintenance purposes. More importantly, “[i]f the intrusion was due to an accident caused by *negligence* or by an abnormally dangerous condition, an action for trespass is not proper.’’³⁸ Here, there is no evidence that defendant intended for its wire to fall on the church property. Plaintiff has further failed to demonstrate that there was a “substantial certainty” that such a trespass would occur. Rather, as noted by the trial court, plaintiff’s claim that defendant knew a trespass would occur given the allegedly improper configuration and maintenance of its equipment is more akin to a negligence claim.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

³⁶ *Jackson, supra* at 82, quoting *Cloverleaf, supra* at 195.

³⁷ *Jackson, supra* at 82.

³⁸ *Id.* at 82-83 (emphasis added).